

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES J. WOOD, JR.**  
Claimant

VS.

**BRUMBACK and ADKINSON CONST.**  
Respondent

AND

**RELIANCE NATIONAL INSURANCE CO.<sup>1</sup>**  
Insurance Carrier

**Docket No. 259,161**

**ORDER**

**STATEMENT OF THE CASE**

Respondent and Western Guaranty requested review of the May 6, 2013, Post Award Order for Medical Treatment Upon Remand by Administrative Law Judge Brad E. Avery. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument. William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and Western Guaranty.

The Board has considered the Post Award hearing transcript dated August 24, 2012; the deposition of James J. Wood, Jr., with exhibits, dated October 17, 2012; the deposition of Claudia Renegar, with exhibits, dated November 2, 2012; and, all pleadings in the administrative file.

**ISSUES**

The ALJ found respondent/Western Guaranty did not provide the required medical services to claimant in the form of prescription services and stated:

The claimant's location in Hawaii and the failure of the insurance carrier to provide a workable arrangement for the procurement of prescribed medications constituted an extraordinary circumstance. Claimant's past due prescription bills are ordered

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<sup>1</sup> Claudia Renegar testified that Reliance National Insurance Co. went bankrupt and Western Guaranty Fund a/k/a Kansas Guaranty Association is a non-profit organization handling this claim.

paid, per claimant's ex. #2. The respondent/insurance carrier are directed to provide a workable arrangement by which Mr. Wood is able to procure prescriptions provided by his authorized physicians. This may include a workable prescription card and/or use of the mail to procure prescriptions and should include the provision of information and a prescribed channel of communication to remedy unforeseen circumstances. The designation of a third party administrator for billing purposes is beyond this Court's jurisdiction, since such is not the provision of medical treatment within the meaning of K.S.A. 44-510k.

The Court would note out of state pharmacies that provide medications to a Kansas workers compensation claimant are required to adhere to the Kansas Fee Schedule, see page two of the *Schedule of Medical Fees*. However, the burden for adherence to the schedule is not on the claimant but rather the pharmacy. There are provisions in the Workers Compensation Act for an insurance carrier to deal with disputed charges. See K.S.A. 44-510j. Failing to insure the provision of prescription coverage to the claimant is not one of them.<sup>2</sup>

Respondent/Western Guaranty requests review of whether the ALJ erred in authorizing a specific pharmacy in which claimant can fill his medications even though the pharmacy does not acknowledge the Kansas Medical Fee Schedule. Respondent/Western Guaranty raised three issues:

1. Did respondent/Western Guaranty fail to provide prescription services to claimant, thus, entitling him to seek prescription services on his own?
2. Did the circumstances involving claimant and his attempt to procure prescription services constitute "extraordinary circumstances," thus, permitting an Order for the payment of unauthorized prescriptions billed in excess of the Kansas Fee Schedule?
3. Can prescription services be billed in excess of the Kansas Fee Schedule and be ordered paid in full contrary to the mandate of K.S.A.44-510i(c)(3)?

Claimant argues the ALJ's Post Award Order for Medical Treatment Upon Remand should be affirmed.

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

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<sup>2</sup> ALJ Order at 4.

On May 18, 2009, the SALJ approved a running award on claimant's behalf for a 17% permanent partial disability to the body as a whole. Claimant reserved his rights to future medical treatment and also review and modification.

Claimant currently resides in Kapolei, Hawaii, since March 2005. He previously lived in Pittsburg, Kansas. Claimant's medical care for his workers compensation claim was transferred to physicians in the State of Hawaii. Workstar Occupational Health & Injury (Workstar) was authorized to treat claimant.

Claimant picked up his pain medication from the pharmacy located in the same building as Workstar. A company known as Prescription Partners billed for the pharmacy. Claimant testified that Workstar is 6 miles from his home and it takes him 15 minutes to get there. In February 2011, respondent/Western Guaranty asked claimant to get his prescriptions at Longs Drug Store and provided claimant with a prescription card known as a Cypress Care card. Claimant testified that he was able to purchase his medication with the Cypress Care card in February 2011, but in March 2011 the Longs Drug Store advised claimant that he did not have any coverage with the Cypress Care card. Claimant returned to his physicians at Workstar, who advised claimant to get his prescriptions at the Workstar pharmacy. Claimant went back to filling his prescriptions at the Workstar pharmacy for about a year.

In February 2012, claimant received a letter, along with another Cypress Care card, directing him to use the Cypress Care card in order to fill his prescription medication. Claimant tried to fill a prescription with the new Cypress Care card at Longs Drug Store, was told his claim was closed, there was no coverage and his prescription could not be filled. Claimant disposed of the Cypress Care card. He could not recall if he ever requested that the card be replaced. As of the date of claimant's deposition, October 17, 2012, the Cypress Care card had not been replaced.

Claimant returned to the Workstar pharmacy where he filled his prescriptions in February, March and April 2012. He never attempted to use the Cypress Care card at the Workstar pharmacy. In May 2012, claimant discovered that his prescriptions at the Workstar pharmacy had not been paid and contacted his attorney.

Claimant testified:

Q. Without medication and unable to get it at Work Star, and without a card did you go back to Longs Pharmacy to see would [sic] they could do for you?

A. Yes.

Q. What did they do for you in May of 2012, May 31st of 2012?

A. We went to the pharmacy and we checked with them to see if they still had the Cypress information on file. Because Cypress would not send another card. And the information was on file, and they told us we had to wait for authorization on the prescriptions. And some of the waits were up to two weeks. With three or four trips to the pharmacy, you know, and phone calls and stuff of that nature.

Q. So, in other words, without the card they wouldn't fill the prescription but they still had the information from the card, and over a two week period you got your prescription?

A. That's correct.<sup>3</sup>

Claimant testified that he drives four miles to Longs Drug Store and returns to his home. Although Longs Drug Store is the closest pharmacy to claimant's home, it takes about an hour or more to get there, due to traffic. Claimant further testified that it is much easier and more convenient if he could fill his prescriptions in the same building where he sees the doctor. Claimant testified that he has to make two or three trips to the pharmacy in order to get the prescriptions filled from a doctor's visit.

Q. Jamie, is the problem not so much the additional drop-off, but what is the additional problem with the Cypress card and Longs Pharmacy?

A. It's always a hassle, and you always have to go back, you know, multiple times. As you can see by the notes, you know, to get one prescription filled sometimes takes two weeks. And that isn't really -- the bigger part of the issue sometimes I have to go, you know, two or three days, sometimes two weeks without taking all this stuff. And it's like, you know, you start taking it, you stop taking it. Then I got to put up with the pain, and the problems that I have getting around. You know.

When I go to Work Star I simply go to my office, or go to the office visit, the doctor sees me, I have my prescription in about ten minutes, I sign for it and I am out the door. I don't have to go back and make multiple trips to go other places. And I really like it. It's convenient, it saves me a lot of time. And I don't have to wait, you know, to take the prescriptions, you know, if they don't fill them. I don't have to wait. And my feet and legs will hurt for two weeks, then I get my medications, and get back on them, and back on them. It's like a roller coaster. You never know if it's going to work or not going to work.<sup>4</sup>

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<sup>3</sup> Wood Depo. at 10-11.

<sup>4</sup> *Id.* at 32-33.

Claimant, on cross-examination admitted that he never checked with Longs Drug Store to see if the doctor could call in his prescriptions and whether claimant could pick them up at his convenience.

Claudia Renegar, senior claims examiner for Western Guaranty, testified that the physicians at Workstar have been authorized to treat claimant. Respondent/Western Guaranty decided to no longer authorize prescriptions filled by the pharmacy at Workstar and sent a letter dated February 1, 2012, to claimant's attorney and Prescription Partners informing them that as of February 28, 2012, Prescription Partners was de-authorized to provide claimant prescriptions. Instead, Cypress Care, a pharmacy benefit management company, was authorized.

Cypress Care is a pharmacy benefit management company. Either the doctor or the patient notifies them what prescription they need. The doctor can fax prescriptions to them, or the patient can go to the pharmacy. I will authorize the doctors in the system and which prescriptions are authorized, so when the patient goes to the pharmacy, they just get filled and Cypress bills us.<sup>5</sup>

In February 2012, Ms. Renegar requested Cypress send claimant a second prescription card. The first card was sent to claimant in November 2011. Prescription Partners continued to fill prescriptions for claimant in March and April 2012, despite being de-authorized. Ms. Renegar sent letters to Prescription Partners dated March 14, April 11 and May 11, 2012 indicating that Western Guaranty would not pay claimant's prescriptions due to Prescription Partners no longer being an authorized provider. In letters dated March 23 and April 4, 2012, to Prescription Partners, Ms. Renegar indicated that cost of the prescription exceeded the Kansas Fee Schedule would not be paid by respondent/Western Guaranty. Ms. Renegar testified that Cypress Care billed below any fee schedules so it would save respondent/Western Guaranty approximately \$939.37 per a month. Prescription Partners bills exceeded the Kansas Fee Schedule.

Ms. Renegar testified that Longs Drug Store is actually 2.8 miles from claimant's home and there were 10 other pharmacies that were even closer to claimant's home. She also testified that the morning of her deposition, November 2, 2012, she called Cypress Care and discovered it offers a program whereby the doctor can call or fax the prescription to Cypress Care, and Cypress Care will then mail the prescription to claimant. Also, the physician can call the prescription into the pharmacy where it could be picked up by claimant. Ms. Renegar contacted the physicians at Workstar and was informed they would be willing to call or fax claimant's prescription into Cypress Care or a pharmacy. On November 1, 2012, Ms. Renegar asked Cypress Care to send claimant yet another

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<sup>5</sup> Renegar Depo. at 8.

prescription card. However, Ms. Renegar testified that it was not necessary for claimant to have a prescription card to get his prescriptions filled at Longs Drug Store.

At Ms. Renegar's deposition, two letters from claimant's attorney to respondent/Western Guaranty's former attorney dated May 29 and June 4, 2012, were placed into evidence. The May 29 letter demanded that respondent/Western Guaranty pay a bill from Prescription Partners in the amount of \$276.64 and indicated claimant had a prescription card eight months earlier, but threw it away. The June 1 letter demanded that respondent/Western Guaranty allow the pharmacy at Workstar fill claimant's prescriptions. Neither letter asked respondent/Western Guaranty to provide claimant with a new prescription card, resolve the issues with Longs Drug Store, or resolve the prescription issue some other way.

### **PRINCIPLES OF LAW AND ANALYSIS**

The Post Award Order for Medical Treatment Upon Remand, cited K.S.A. 44-510h, 44-510i, 44-510j; and 44-510h. Those statutes were not in existence when claimant was injured. Instead, K.S.A. 1998 Supp. 44-510 controlled.

K.S.A. 1998 Supp. 44-510(a) provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

As noted above, K.S.A. 1998 Supp. 44-510(a) requires that claimant be provided such medical treatment as is "reasonably necessary" to treat and relieve the effects of those injuries. The case law interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.<sup>6</sup> K.S.A. 1998 Supp. 44-510(a) established a fee schedule for health care services.

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<sup>6</sup> See *Carr v. Unit No. 8169*, 237 Kan. 660, 703 P.2d 751 (1985); *Harris v. Bechtel-Dempsey-Price*, 160 Kan. 560, 164 P.2d 89 (1945); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935); *Dinkel v. Graves*, 10 Kan. App. 2d 604, 706 P.2d 470 (1985).

K.S.A. 1998 Supp. 44-510(a) states:

(3) The schedule of maximum fees shall be reasonable, shall promote health care costs containment and efficiency with respect to the workers compensation health care delivery system, and shall be sufficient to ensure availability of such reasonably necessary treatment, care and attendance to each injured employee to cure and relieve the employee from the effects of the injury.

. . . .

(5) Any contract or any billing or charge which any health care provider, vocational rehabilitation service provider, hospital, person, or institution enters into with or makes to any patient for services rendered in connection with injuries covered by the workers compensation act or the fee schedule adopted under this section, which is or may be in excess or not in accordance with such act or fee schedule, is unlawful, void and unenforceable as a debt.

K.S.A. 1998 Supp. 44-510(b) states in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

This is a matter that easily could have been resolved by the parties without the necessity of a hearing. In February 2011, claimant successfully used the Cypress Care card at Longs Drug Store. In March 2011, claimant had difficulties using the card so he went back to the pharmacy at Workstar and had his prescriptions filled there for another year, which respondent/Western Guaranty apparently paid. The record does not indicate claimant contacted his attorney or anyone else to resolve the problems at Longs Drug Store. Nor did Western Guaranty do anything to remedy the situation.

On February 1, 2012, respondent/Western Guaranty contacted claimant's attorney and indicated the pharmacy at Workstar would no longer be authorized after February 28, 2012. Claimant attempted to use the prescription card at Longs Drug Store, but was told his case was closed. Claimant did not attempt to use the Cypress Care card at the Workstar pharmacy. The record does not indicate that claimant tried to remedy the situation at Longs Drug Store, give Longs a second chance or contact his attorney. Instead, he chose to throw the prescription card away and again fill his prescriptions at the Workstar pharmacy. It was only after respondent/Western Guaranty refused to pay claimant's February, March and April 2012 prescription bills at the Workstar pharmacy did claimant contact his attorney.

When it came to the attention of claimant's counsel that claimant had thrown away his prescription card, two letters were sent by claimant's attorney to respondent/Western Guaranty's counsel, but neither of those letters requested a new prescription card. Instead, the course of action claimant chose was to demand he be allowed to fill his prescriptions at the Workstar pharmacy. Ms. Renegar made a couple of telephone calls and determined that claimant's physicians could call or fax his prescriptions to a pharmacy to be filled or to Cypress Care so the prescriptions could be mailed to claimant. Claimant could easily have done this himself.

Claimant testified that traveling four miles to Longs Drug Store took an hour, which was inconvenient. However, the pharmacy at Workstar was six miles from claimant's home. Claimant asserted the closest pharmacy to his home was Longs Drug Store, but Ms. Renegar found ten pharmacies closer to claimant's home than Longs Drug Store. There is nothing in the record to indicate claimant attempted to find a pharmacy other than Longs Drug Store or the one at Workstar that would accept the Cypress Care card.

There is no language in K.S.A. 1998 Supp. 44-510 that states that an employee's medical treatment must be convenient. An employer has the right to choose claimant's medical provider. In this situation, respondent/Western Guaranty wanted claimant to use a pharmacy that abided by the Kansas Fee Schedule. Requiring an employer or its carrier to provide medical treatment with a medical provider most convenient to the claimant infringes upon the employer's right to choose claimant's medical provider. Simply put, the Board reverses the order and finds that respondent/Western Guaranty provided claimant the required medical services in the form of prescription services.

Claimant's Hawaii location is not an extraordinary circumstance. The record contains little evidence that since claimant moved to Hawaii in 2005, he had issues with medical treatment or filling his prescriptions until this matter arose. While there were some glitches with claimant's prescriptions, the Board finds there was not a failure by respondent/Western Guaranty to provide a workable arrangement for claimant to procure his prescribed medication.

In *Sims*,<sup>7</sup> respondent argued and the Board agreed that the ALJ erred by ordering it to reimburse claimant's health insurance carrier for the medical expenses claimant incurred for treatment of her low back injury. That was because K.S.A. 44-510i(c)(3) which is the current version of K.S.A. 44-510(a)(5) stated that any medical billing in excess of the fee schedule is unlawful, void and unenforceable as a debt. Therefore, the Board will not require respondent/Western Guaranty to pay any of claimant's prescription expenses that exceeded the Kansas Fee Schedule.

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<sup>7</sup> *Sims v. Visiting Nurses Association*, No. 1,029,145, 2008 WL 4857919 (Kan. WCAB Oct. 27, 2008).



As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>8</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**CONCLUSION**

Respondent/Western Guaranty provided claimant with prescription services as required by K.S.A. 1998 Supp. 44-510. The record does not establish there were any extraordinary circumstances. Respondent/Western Guaranty is ordered to pay claimant's prescription bills provided through the pharmacy at Workstar and billed through Prescription Partners through February 28, 2012. All prescription bills incurred by claimant thereafter shall be paid by respondent/Western Guaranty, to the extent permitted under the Kansas Fee Schedule.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Post Award Order for Medical Treatment Upon Remand dated November 29, 2012, is modified as follows:

1. The Board reverses ALJ Avery's finding that respondent/Western Guaranty failed to provide the required medical services in the form of prescription services to claimant.
2. The Board reverses ALJ Avery's findings that there were extraordinary circumstances.
3. Respondent/Western Guaranty is ordered to pay claimant's prescription bills provided through the pharmacy at Workstar and billed through Prescription Partners through February 28, 2012.
4. All prescription bills incurred by claimant thereafter shall be paid by respondent/Western Guaranty, to the extent permitted under the Kansas Fee Schedule.
5. Respondent/Western Guaranty is ordered to provide a workable solution for claimant to procure his prescriptions and claimant is to cooperate with respondent/Western Guaranty to reach that solution.

**IT IS SO ORDERED.**

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<sup>8</sup> K.S.A. 1998 Supp. 44-555c(k).

Dated this \_\_\_\_\_ day of July, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Brad E. Avery, ALJ